

¹ E. L. Lee Kinch of Wichita, Kansas, was appointed to serve as a Board Member pro tem in this matter in place of former Board Member Carol Foreman.

ISSUES

Respondent employed claimant as an electrician's helper. The parties agree that on December 8, 2008, claimant injured his back while lifting and handling a heavy power meter. After claimant underwent conservative medical treatment and was released to return to work, respondent did not allow him to resume employment. Claimant remains unemployed.

In the May 17, 2010, Award, the ALJ awarded claimant a 64.5 percent permanent partial general disability for a 100 percent wage loss and a 29 percent task loss. The ALJ found claimant was a part-time worker because respondent usually scheduled him to work less than 40 hours per week. Consequently, the ALJ determined claimant's average weekly wage was \$318.50 (\$313.89 regular earnings plus \$4.61 overtime).

The only issue claimant raises in this appeal is his average weekly wage. Claimant maintains he should be considered a full-time worker under the Workers Compensation Act as he was told when hired to be available to work 40 hours a week.

Respondent asks the Board to affirm the ALJ's finding that claimant worked part-time. Respondent challenges the assertion that claimant was told when he was hired to be available to work 40 hours per week. Respondent emphasizes that claimant routinely worked less than 40 hours per week as he only worked, on average, approximately 28 hours per week. Next, respondent maintains claimant did not sustain any permanent injury as a result of his work-related accident and, therefore, he should not receive any permanent partial disability benefits. Moreover, respondent asserts that awarding claimant a work disability² would be a gross miscarriage of justice as claimant's injuries are allegedly minor and claimant allegedly retains the ability to earn a comparable wage. In summary, respondent requests that the Board deny claimant's request for permanent partial disability benefits, find the opinion of John H. Gilbert, M.D., that claimant suffered no permanent impairment is the most credible, and to find that claimant's average weekly wage is only \$280.48.

The issues before the Board on this appeal are:

1. What is claimant's average weekly wage?
2. What is the nature and extent of claimant's injury and disability?

² A permanent partial disability under K.S.A. 44-510e that is greater than the functional impairment rating.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant, who is 21 years old, began working for respondent as an electrician's helper in approximately April 2008 after moving to Kansas from Florida. Claimant learned of the job from his stepfather, who was working for respondent.

Claimant hurt his mid and upper back on December 8, 2008, while lifting a temporary power meter weighing between 180 and 200 pounds. At the regular hearing respondent stipulated claimant sustained personal injury by accident arising out of and in the course of his employment with respondent.

Respondent initially referred claimant to a chiropractor for treatment. After several visits to the chiropractor, claimant ultimately was treated by Dr. Michael Smith, an orthopedic surgeon in Topeka. Dr. Smith prescribed physical therapy and on February 17, 2009, released claimant to return to work without restrictions. Claimant contacted respondent about resuming work but he was advised that work was diminishing and he was no longer needed. Consequently, claimant found himself unemployed. Despite looking for other employment, claimant remained unemployed in February 2010 when he testified at his regular hearing.

Average weekly wage

Claimant contends his average weekly wage should be calculated as that for a full-time employee using a 40-hour workweek as provided in K.S.A. 2008 Supp. 44-511. Conversely, respondent argues that claimant should be considered a part-time worker.

The Workers Compensation Act addresses computing a worker's average weekly wage in K.S.A. 2008 Supp. 44-511, which provides in part:

(a)(4) The term "part-time hourly employee" shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee.

(a)(5) The term "full-time hourly employee" shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week.

. . . .

(b)(4) If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: (A) If the employee was a part-time hourly employee, as defined in this section, the average gross weekly wage shall be determined in the same manner as provided in paragraph (5) of this subsection; (B) if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (i) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, **but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee**, unless the employer's regular and customary workweek is less than 40 hours, in which case, the number of hours in such employer's regular and customary workweek shall govern; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation. (Emphasis added.)

(b)(5) . . . the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be, plus the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. . . .

Claimant testified that when he was hired Joe Mitchell, respondent's owner, agreed to pay claimant \$10 per hour and that he would be working 40 hours per week. Claimant testified in part:

Q. (Mr. Pearson) Okay. [Your stepfather] said they're hiring and you talked to Joe Mitchell, the owner, and ended up being hired over the phone?

A. (Claimant) Yes.

Q. And what did Mr. Mitchell tell you about what your status would be vis a vis full versus part time?

A. He just said I'd be working full time, 40 hours a week.

Q. That's what Mr. Mitchell told you?

A. Yes.

Q. Okay, did you all discuss what your rate of pay would be?

A. I said ten dollars, he agreed to it.

. . . .

Q. Did he say anything about I guarantee you 40 hours or we expect that we'll work you 40 hours?

A. He said be available for 40 hours.³

No representative of respondent testified in this matter. Accordingly, claimant's testimony is the only evidence in the record regarding the terms of the employment contract and what was said between the parties. The record, however, does contain the amounts that claimant was paid while working for respondent. The wage record introduced at the regular hearing⁴ indicates claimant was paid every two weeks and that he routinely worked less than 80 hours every two weeks. That wage statement reveals claimant was paid for the following hours and earned the following gross wages for the following pay periods:

	End date	Regular time	Overtime	Gross pay
1.	12/14/08	38 hrs.		\$380
2.	11/30/08	64		640
3.	11/16/08	69.5		695

³ R.H. Trans. at 10, 11.

⁴ *Id.*, Resp. Ex. A.

4.	11/02/08	40.5		405
5.	10/19/08	32		320
6.	10/05/08	63.5		635
7.	09/21/08	48		480
8.	09/09/08	55.5		555
9.	08/24/08	61.5		615
10.	08/10/08	67.5		675
11.	07/27/08	52		520
12.	07/13/08	54.5	8 hrs.	625
13.	06/29/08	55.5		555
14.	06/15/08	55	1.5	572.5

The wage statement also revealed there were three other pay periods outside the pertinent 26-week window in which claimant worked overtime. Out of the approximately 35 weeks that claimant worked for respondent, only once did claimant work 80 hours or more during a two-week pay period.

Because the record does not reveal the number of hours claimant worked or his gross pay on a *weekly basis*, some speculation is required to compute the gross pay claimant received during the 26-week period before his December 8, 2008, accident. As indicated above, at oral argument before the Board the parties stipulated that claimant's average weekly wage is \$280.48 if he is a part-time employee, but \$405.48 if he is a full-time employee.

The ALJ found claimant was a part-time worker. Claimant cites *Beck*⁵ and maintains his straight-time weekly wage should be calculated using 40 hours per week. In *Beck*, the employee Darla Beck testified she was required to be available to work 40 hours per week; however, she was allowed to go home early upon completing her work. Indeed, during the six months before her injury, Ms. Beck averaged 33.39 hours per week. The Kansas Court of Appeals held:

The record indicates that claimant was regularly scheduled to work 40 hours per week. Although she often left early due to having met her quotas, she was required to be available to work 40 hours per week.

We conclude that claimant meets the definition of a full-time employee since she was required to be available 40 hours per week, and her average weekly wage

⁵ *Beck v. MCI Business Services, Inc.*, 32 Kan. App. 2d 201, 83 P.3d 800, rev. denied 276 Kan. 967 (2003).

was to be determined using the 40-hour work week. We affirm the decision of the Board to that effect.⁶

Claimant's testimony regarding his conversation with Mr. Mitchell and the terms of the employment contract is uncontradicted. Under the terms of that contract claimant expected to work, or be available to work, 40 hours per week. Accordingly, the terms of that employment contract do not meet the definition of being part-time as set forth above. In addition, Dick Santner, the vocational rehabilitation counselor hired by claimant's attorney, testified the customary number of hours in an electrical contractor's workweek was 40, depending upon the weather and work demand.

Considering K.S.A. 2008 Supp. 44-511, *Tovar*⁷ and *Beck*, the Board finds that claimant is considered a full-time worker for purposes of calculating his average weekly wage. Accordingly, based upon the parties' stipulation to the Board regarding the wage amounts, claimant's average weekly wage for purposes of this claim is \$405.48.

Nature and extent of injury and disability

As indicated above, claimant's initial medical treatment consisted of several visits to the chiropractor and several visits to the physical therapist. Claimant described his continuing symptoms as follows:

Q. (Mr. Burghart) There were some questions about your current problems and I want to ask you some questions about that. Why don't you tell me all the problems that you're having that you attribute to the injury of December 8, 2008.

A. (Claimant) When I wake up most days I'm sore. It's hard for me to even get out of bed, hard for me to move, and if I bend or turn real sharp it shoots pain up my back from where I got injured up.

Q. When you say you're sore getting out of bed or stiff getting out of bed, what part of your body is that in?

A. My upper, my upper back, it's hard for me to turn and bend. Hard for me to pull up my pants and stuff when I get out of bed, hard for me to change.

Q. When you say upper back, what does that mean to you?

A. I don't know. Waistline to about just below my shoulders.

⁶ *Id.*, at 205.

⁷ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

. . . .

Q. And then you mentioned -- well, let me back up. As the day goes on do you loosen up and the soreness goes away?

A. Once I start moving and stuff and take a bath and stuff like that, yeah, usually it does.

Q. How long does it take before it goes away?

A. Couple hours.

Q. Do you eventually get to where you're pain free or without any symptoms?

A. It's sore, but not really, I mean, pain free, I wouldn't say that.⁸

Claimant further explained that he experienced the sharp pain in his back when he lifted something "pretty heavy" or if he turned sharply.⁹ And that pain took 45 minutes to an hour to resolve.

Claimant described an incident at home in January 2009 when he believes he aggravated his back lifting a laundry basket. But claimant explained he did not experience any new symptoms from that incident and, furthermore, that his increased symptoms were temporary.¹⁰ The Board finds the evidence fails to establish that lifting the laundry basket caused any additional permanent injury or impairment to claimant's back.

Three doctors provided their opinions in this claim. Claimant's attorney hired Dr. Lynn A. Curtis to evaluate claimant; respondent's insurance carrier hired Dr. John H. Gilbert for the same; and the ALJ selected orthopedic surgeon Dr. Mark Bernhardt for an independent medical evaluation.

Dr. Curtis, who is board-certified in physical medicine and rehabilitation, examined claimant in April 2009 and determined claimant had a cervical spine sprain, a moderate thoracic spine injury with radiculopathy, a sternoclavicular joint injury in the breast plate, and a low back injury, all of which the doctor attributed to claimant's work-related accident.

⁸ R.H. Trans. at 43, 44.

⁹ *Id.*, at 45.

¹⁰ *Id.*, at 57.

Using the fourth edition of the *AMA Guides*,¹¹ the doctor rated claimant as having a 15 percent whole person functional impairment for a cervical and thoracic spine injury, a five percent whole person functional impairment for a low back injury, and a two percent whole person impairment for the sternum injury, all of which comprised a 21 percent whole person impairment. The doctor concluded claimant could occasionally lift 20 pounds from the floor and occasionally lift 30 pounds from the waist to the chest, but the doctor restricted claimant from crawling and climbing ladders.¹² After reviewing a list prepared by Dick Santner of former work tasks that claimant had performed in the 15-year period before his accident, Dr. Curtis concluded claimant should not perform seven of the 12 tasks, or 58 percent.

Dr. Gilbert, who is board-certified in orthopedic surgery and independent medical evaluations, examined claimant in May 2009. According to the doctor, claimant was complaining of persistent pain in the thoracolumbar junction and paravertebral region on the right side. Dr. Gilbert diagnosed a thoracolumbar strain, which did not warrant a functional impairment rating under the *AMA Guides*.¹³ Moreover, the doctor indicated claimant needed no *formal* work restrictions and, therefore, claimant had sustained no task loss. Dr. Gilbert, however, believed claimant should continue both the home exercise program he had been given while in physical therapy and the over-the-counter medications he finds necessary.

Dr. Bernhardt examined claimant in October 2009. According to the doctor's October 27, 2009, report, claimant reported pain in his hands, upper thoracic and middle lumbar spine, which increased with activity. Dr. Bernhardt diagnosed chronic cervicothoracic spine pain and chronic low back pain. Using the *AMA Guides*, the doctor rated claimant as having a two percent whole person functional impairment. The doctor noted claimant had undergone a whole body bone scan in January 2009, but the doctor concluded the increased uptake in the sternoclavicular joints was unrelated to the work injury. Dr. Bernhardt did not testify and his medical report mentions neither work restrictions nor task loss.

The evidence establishes that claimant has ongoing back symptoms despite receiving conservative medical treatment. Although claimant's injury may be deemed minor by some, the injury has adversely affected his ability to work and has further

¹¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

¹² Curtis Depo. at 9.

¹³ Gilbert Depo. at 20, 21.

narrowed his labor market.¹⁴ The Board concludes the opinion of Dr. Bernhardt, whom the ALJ selected to provide an independent and unbiased opinion, is the most persuasive as to claimant's permanent impairment of function. Consequently, the Board finds claimant has sustained a two percent whole person functional impairment.

Back injuries are not included in the schedule of K.S.A. 44-510d. And when an injury is not included in that schedule, permanent partial general disability is determined under K.S.A. 44-510e(a), which provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of **permanent partial general disability shall be** the extent, expressed as a percentage, to which the employee, **in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. (Emphasis added.)

Because claimant has not returned to work following his work injury, his actual wage loss is 100 percent.

Only Dr. Curtis and Dr. Gilbert addressed claimant's task loss. Dr. Curtis believed claimant had a 58 percent task loss and Dr. Gilbert did not believe claimant had sustained any task loss. The Board believes the truth lies somewhere between those extremes. Consequently, the Board finds claimant has sustained a 29 percent task loss due to his December 2008 work injury.

¹⁴ There is evidence in the record that claimant may have dyslexia, which interferes with his ability to obtain further education and training.

K.S.A. 44-510e states that permanent partial general disability is the average of a worker's wage loss and task loss. And the recent decision in *Bergstrom*¹⁵ confirms that as the Kansas Supreme Court held the language of K.S.A. 44-510e is clear and unambiguous that determining permanent partial general disability is accomplished by merely averaging a worker's actual wage loss with the worker's task loss. Moreover, the Kansas Supreme Court ruled that the Board should neither delve into a worker's efforts to find appropriate employment nor question a worker's unemployment following an accident. In short, the Kansas Supreme Court held the formula for permanent partial general disability in K.S.A. 44-510e should be followed explicitly and the Board should not attempt to determine what the law should or should not be. The Kansas Supreme Court stated, in pertinent part:

When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.¹⁶

The Kansas Supreme Court rejected the argument that a worker's ability to earn wages was a factor to be considered in determining permanent partial general disability.

The Board is compelled to follow the explicit language of the disability formula and use claimant's actual post-injury wages in the wage loss prong of the formula. The Board may not carve out exceptions to that formula based upon equitable precept or putative public policy. The permanent partial general disability formula under K.S.A. 44-510e is an average of the worker's actual wage loss and the worker's task loss. Averaging those losses (100 percent and 29 percent) yields a 64.5 percent permanent partial general disability.

In summary, the May 17, 2010, Award should be modified to correct claimant's average weekly wage. The Board affirms the ALJ's finding that claimant has sustained a 64.5 percent permanent partial general disability.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.¹⁷ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

¹⁵ *Bergstrom v. Spears Manufacturing Co.*, 289 Kan. 605, 214 P.3d 676 (2009).

¹⁶ *Id.*, Syl. ¶ 1.

¹⁷ K.S.A. 2009 Supp. 44-555c(k).

AWARD

WHEREFORE, the Board modifies the May 17, 2010, Award entered by ALJ Rebecca A. Sanders to correct claimant's average weekly wage.

Jacob M. Ludlam is granted compensation from Joe's Electric, Inc., and its insurance carrier for a December 8, 2008, accident and resulting disability. Based upon an average weekly wage of \$405.48, Mr. Ludlam is entitled to receive 10.43 weeks of temporary total disability benefits at \$270.33 per week, or \$2,819.54, plus 267.68 weeks of permanent partial disability benefits at \$270.33 per week, or \$72,361.93, for a 64.5 percent permanent partial general disability, making a total award of \$75,181.47.

As of December 15, 2010, there is due and owing to the claimant 10.43 weeks of temporary total disability compensation at \$270.33 per week, or \$2,819.54, plus 95 weeks of permanent partial general disability compensation at \$270.33 per week, or \$25,681.35, for a total due and owing of \$28,500.89, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$46,680.58 shall be paid at \$270.33 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of January, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: George H. Pearson, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Rebecca A. Sanders, Administrative Law Judge